IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.348 OF 1989

Suresh Janardan Tare ...Appellant

vs.

The State of Maharashtra ...Respondent

S/Shri Y.B.Rawool and Mr.R.R.Gonsalves for the Appellant
Mr.U.V.Nikam,A.P.P. for State

CORAM: A.S.OKA,J.
DATE : NOVEMBER 24 and 27,2006.

ORAL JUDGMENT:

1. By this Appeal, the Appellant has taken exception to the Judgment and Order dated 5th May 1989 passed by the Additional Sessions Judge, Thane in Sessions Case No.210 of 1988. By the said Judgment and Order, the Appellant-accused has been convicted for an offence under section 20(b) (ii) of Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as N.D.P.S.Act). The Appellant has been sentenced to suffer rigorous imprisonment for ten years and to pay fine of Rs.1,00,000/-. In default of payment of fine,he has been directed to undergo R.I. for two years.

2. Briefly stated, the case of the prosecution is that Shri Kadam Police Sub Inspector attached to local Crime Branch was on patrolling duty on 4th January 1988. When he was at Virar Police station at 4.00 a.m., an informant gave him information that a truck containing charas was brought on Bombay-Ahmedabad Highway near village Sakwar, Taluka Vasai, District Thane on

its the eastern side near the house of the Appellant and gunny bags containing charas were being unloaded. He made an entry of the said information in the station diary of the Police Station at Virar. Thereafter, he left the police station with raiding party and panch witnesses. Head Constable Jadhav and other staff members went by a private vehicle and reached Sakwar. The raiding party went to Hotel Gitanjali which is allegedly owned by the Appellant. The raiding party found that accused-appellant was sitting on cash counter of the said hotel. P.S.I. Kadam interrogated the Appellant in presence of the panch witnesses and disclosed the information received by him. The Appellant was avoiding to give answers. P.S.I. Kadam in presence of the panch witnesses started taking search of the hotel premises of the Appellant. It was found that there is a passage in between the residential house of the Appellant and his hotel. In the said passage 11 bags of charas were found hidden. Thereafter, the Appellant pointed out the place where gunny bags containing charas were hidden underneath ground. According to the prosecution, P.S.I. attached 20 gunny bags from the place. Thereafter, accused took them to the northern side at a distance of 285 feet and showed one ditch where bags of charas were hidden. After digging the said place, 16 bags of charas were found. According to the prosecution case, P.S.I.Kadam attached 47 gunny bags in the search. The gunny bags of charas were weighed and it was found that total quantity was of 1188 kgs. 150 gms. Weighing was done by one Mataprasad. In presence of

the said Mataprasad, and panch witnesses as well as the accused, P.S.I. Kadam took some quantity of charas from the said packets for the purpose of sample. The total weight of sample collected was 800 gms. The sample was kept in a separate packet and it was duly sealed with the seal of police station under the signature of the panchas. Remaining gunny bags were also sealed with the seal of police station under the signature of panchas. P.S.I. Kadam drew a detailed panchnama of seizure and attachment of charas and of taking the sample. A copy of panchanama was supplied to the Appellant. P.S.I. Kadam had sent a message with the Constable to his superior Police Inspector Nimbalkar who was on patrolling duty on Bombay Ahmedabad Highway. On getting the message, the said Police Inspector proceeded towards village Sakwar and reached Hotel Gitanjali when process of writing panchnama was going on. He recorded F.I.R. of P.S.I. Kadam attached to said Police station. Muddemal and the accused were sent to Virar Police Station. P.S.I.Kadam who was incharge of Virar Police station received a complaint and Muddemal and caused arrest to be made. Panchnama was also received by him. P.I. Nimbalkar attached to A.C.B. Thane was entrusted with the job of investigation of the crime. Muddemal was kept in the custody of the Police Station. P.I. Nimbalkar attached to Virar Police Station immediately forwarded the sample of the attached Muddemal sample to the Chemical Analyser, Pune along with a covering letter. Thereafter, a report was received from the Chemical Analyser.

After completion of investigation, charge sheet was filed.

3. Prosecution examined six witnesses. After considering the evidence led by the prosecution, the learned Additional Sessions Judge recorded a finding of guilt and sentenced the Appellant as aforesaid.

4. The learned Advocate for the Appellant has made detailed submission. His first submission is that the alleged information received by P.S.I. Kadam was not immediately reduced in writing and a copy thereof was not forthwith sent by him to his immediate official superiors. He submitted that the search was commenced much before sunrise. He submitted that the grounds of belief as required by proviso to sub section 1 of section 42 of N.D.P.S.Act were not at all recorded which was a condition precedent for entering the place any time between the sunset and the sunrise. He submitted that not only the ground of his belief were not recorded but there is further non compliance with sub section 2 of section 42 of N.D.P.S.Act. He submitted that the Police Officer who recorded the F.I.R. could not have been appointed as an Investigating Officer and as he acted as an Investigating Officer, prejudice has been caused to the Appellant. He submitted that by reason of non-compliance with the requirements of sub section 1 and sub section 2 of section 42, the trial and consequently conviction of the Appellant was vitiated.

5. He submitted that a copy of the seal of a Police station which was affixed on the sample as well as on the contraband was not forwarded to the Chemical Analyser and there is nothing on record to show that the original seal was deposited with the Officer incharge of the Police Station. He submitted that due to failure to comply with these requirements, the prosecution case has become doubtful. He also invited my attention to the fact that there is discrepancy in the weight of the sample as reflected from the panchnama and the weight of the sample reflected in the report of the Chemical Analyser. He submitted that the report of the Chemical Analyser is not sufficient to establish the possession of the contraband by the Appellant as the report does not contain any details of the tests used by the person who analysed the sample. He submitted that the samples drawn from each bag were mixed together and therefore it is difficult to place reliance on the report of the Chemical Analyser and at least it is difficult to base conviction on the report of the Chemical Analyser. He submitted that it is not at all established by the prosecution that the sample which was collected at the time of search was delivered to the office of the Chemical Analyser and the person who carried the sample to the Chemical Analyser’s office has not been examined. He submitted that in view of various deficiencies in the prosecution case, presumption under section 54 of the said Act cannot be invoked by the prosecution. He has placed

reliance on the various decisions, a reference to which will be made in the later part of this Judgment.

6. The learned A.P.P. supported the impugned Judgment and Order. He submitted that the information received by P.S.I. Kadam was that gunny bags containing charas were dumped in front of house/hotel of the Appellant. Only after visiting the said place, it was learnt that the certain bags were stored inside the hotel premises. He, therefore, submitted that it was a chance recovery and therefore, section 42 of the said Act will have no application. In any event, part of the contraband has been recovered from the open space and part was recovered from the hotel premises. He submitted that in view of definition of a public place under section 43 of the said Act, a hotel was a public place and therefore, for the search and seizure, provision of section 42 will not apply. He submitted that part of the recovery is made from open space in the open ground. It cannot be said to be a building, conveyance or an enclosed place. He therefore, submitted that section 42 has no application in the present case. So far as the submission about the failure of the Officer to forward a copy of the seal to the Chemical Analyser and failure to deposit the seal with the police station is concerned, he submitted that neither the trial nor conviction is vitiated only on this ground as the said requirement is not a mandatory requirement. He submitted that it is otherwise established that the sample which was collected at the time of search was

sent to the Chemical Analyser for analysis. He submitted that the alleged discrepancy in the weight of the sample is a minor discrepancy which does not affect the core of the prosecution case. He submitted that no interference is called for. He has also placed reliance on various decisions of this Court and Apex Court, a reference to which will be made subsequently.

7. Before appreciating the submissions made by the learned Counsel appearing for the parties, it will be necessary to refer to the evidence of the prosecution witnesses. P.W.NO.1 Shri Uttam L. Kadam who was at the relevant time P.S.I. attached to local Crime Branch, Thane. He reiterated the prosecution case regarding the information received by him at 4.00 a.m. on 4th January 1988. He also stated he reduced the information in the station diary. He also described the manner in which the raiding party raided the place where the Appellant was sitting and the manner in which the search was taken. He stated that the Appellant was found sitting near the cash counter of "Hotel Geetanjali". He stated that while taking search, the raiding party found iron drums and old tyres of cycle and some articles in the passage. He stated that the raiding party found 11 bags of charas in the passage in the aforesaid articles. He stated that after finding the said 11 bags of charas, he made interrogation with the Appellant and enquired about the remaining bags of charas.

Thereafter the Appellant pointed out the place on the southern side of his house and produced 20 gunny bags of charas which were kept under the ground. He stated that after further interrogation the Appellant took the raiding party towards northern side of the house at a distance of 285 feet and produced 16 boxes of charas from the ditch. Thus, according to him 47 gunny bags of charas totally weighing 1188 kgs and 150 gms were seized. He stated that there were several marks on the packets of charas. He stated that on some bags in Urdu language it was written "Made in Pakistan". According to him, from each packet, a small quantity was collected as a sample. The total weight of the samples collected was 800 gms. The attached sample was kept in a paper cover and it was duly sealed under his signature and the signature of the panch witnesses. He stated that the gunny bags were also sealed with the signatures of panch witnesses and his own signature and the seal of the police station was applied. He stated that he himself wrote the panchnama. He proved the panchnama in evidence. He stated that he thereafter handed over a copy of the panchnama to the Appellant. He stated that he thereafter sent a message to the Police Inspector of Local Crime Branch and his superior Officer. On his arrival, the said Officer recorded the complaint of P.W.No.1. The said complaint was proved in evidence by the P.W.No.1. He stated that the Police Inspector of local crime Branch carried out the investigation and he assisted the said Officer in investigation. In the cross examination, he stated that his

F.I.R. was recorded by the Police Inspector at about 3.00 p.m. at the spot. Thereafter, the attached muddemal articles were taken to Virar Police Station along with the Appellant. The witness admitted that he did not reduce the information received from the informant into writing. He stated that he did not inform about the information to his superiors before carrying the raid. He admitted that he did not inform in writing to his superiors about the arrest of the accused and seizure muddemal charas.

8. He admitted that the gunny bags were found in a field and in open land and the said land belongs to the Government. He admitted that he did not seize the licence of the hotel. He stated that the area of the passage between the house and the hotel of the Appellant was 5 1/2′ X 3′. He reiterated that the information which he has received was that some unknown person had hidden gunny bags of charas underneath the ground. According to him the informant also gave information that the gunny bags were hidden underneath the ground in front of the hotel premises of the accused. He admitted that he did not seal each and every packet after collecting the sample.

9. P.W.No.2 Harun Suleman Sayyad was a panch witness at the time of raid. He stated that on 4th January 1988 he was called by Virar Police Station along with other panch witness. Panch witnesses were informed about the information received by P.S.I. Kadam. The said witness described in his evidence

the manner in which the raiding party visited the place and the manner in which the Appellant was found in "Hotel Gitanjali". Then he described as to how the gunny bags of charas were seized. He stated in examination-in-chief that the gunny bags were sealed after the samples were taken out. He proved the panchnama in evidence. He stated that there were 2 to 4 persons working in the hotel. He admitted that he was not aware about the hotel licence at the time of panchnama. He admitted that it was dark when the raid was carried out. He admitted that when gunny bags were taken out from the ditch, there was earth attached to the gunny bags. After collecting the samples, the packets were kept in gunny bags and were sealed. He stated that the seal was not put on the stitched portion of the gunny bags.

10. P.W.No.3 Hiraman Sakharam Panchal was attached to local crime Branch at Thane at the relevant time. He stated in his evidence regarding the information received by P.S.I. Shri Kadam and the manner in which the raiding party proceeded to the spot and the manner in which the raid was conducted. He also narrated the manner in which the gunny bags were seized by the raiding party. He stated about the sealing of the samples and gunny bags. In the cross examination, the said witness admitted that they reached the village Sakwar at 5.30 a.m. and returned to the police station at 5.00 p.m. He stated that P.S.I. Kadam gave complaint at police station at about 2.30 to 3.00 p.m. He admitted that during the course of

search there was sunrise. He stated that panchnama was written in front of hotel Gitanjali.

11. P.W.No.4 Mataprasad Gorakhnath Singh was the person who was called by the police for weighing charas. He stated that he was the owner of the factory at Valiv opposite Burma-Shell Petrol Pump. He stated that he went to village Sakwar with the weighing machine. He stated that boxes of charas were separately weighed. He stated that he weighed the gunny bags containing charas. He proved the sealed boxes received from the Chemical Analyser. In the cross examination, he stated that he was not sure whether there was weighing platform in the Burma-Shell Petrol Pump. He stated that he was unable to tell why the police omitted to mention in his statement that he was serving in the factory where the work of printing sarees is done. He stated that he informed the police that the sample was collected from each packet. He stated that he admitted before police that he went to village Sakwar at 6.00 a.m.

12.P.W.No.5 Shankar Kushaba Chapate who was attached to Virar Police at the relevant time as P.S.O. He stated that he received the complaint lodged by the P.S.I. Kadam along with Panchnama and articles seized by P.S.I.Kadam. He stated that he also received panchanama. He stated that he also received a report along with attached Muddemal sent by P.I. Nimbalkar. He stated that the attached muddemal was countersigned by him and was handed over in the custody of the Muddemal Clerk along

with the sealed sample of charas. According to him, the Muddemal Clerk made an endorsement. He stated that attached Muddemal was sent to the Chemical Analyser with a forwarding letter signed by P.I. Nimbalkar. He stated that there is an endorsement of office of Chemical Analyser on the said letter made on 6th January 1988.

13. In the cross examination, he stated that P.S.I.Kadam was incharge of the station diary on 3rd and 4th January 1988. The entry No.4 made on 4th January 1988 at 4.35 a.m. was in the handwriting of the Head Constable Mali. He again stated that the entry was in the handwriting of P.S.I. Shri Kadam. He admitted the fact that whenever Police Officer leaves the police station, entry had to be made in the station diary. He admitted that there is no entry between 4.35 a.m. to 5.00 a.m. on 4th January 1988 in the station diary. He stated that the charge of the station diary was with him till 5.00 a.m. and his duty was to make entry of F.I.R. received by him in the station diary.

14. P.W.No.6 Shri Chandramohan Raosaheb Nimbalkar stated that he was working as Police Inspector in local Crime Branch Thane from 1 and 1/2 years. He stated that at the relevant time he was on patrolling duty on Bombay Ahmedabad Road. He stated that he received a message from a Constable who came there by a motor cycle that P.S.I. Kadam (P.W.No.1) carried out the raid at village Sakwar and attached the charas packets. He

therefore proceeded to village Sakwar. He stated that when he reached near hotel Gitanjali, he found that the police staff infront of the hotel had recovered the attached muddemal and the process of writing panchnama was going on. He recorded the F.I.R. of P.S.I. Shri Kadam (P.W.No.1). He proved the said complaint in evidence. He stated that he forwarded the complaint, panchnama and attached muddemal to Virar police station for investigation of the crime. He described the manner in which the investigation carried out. The witness further stated that Mataprasad did not state before him that he was working in a factory and the said factory was located beyond the petrol pump.

15. Apart from the oral evidence, the prosecution has placed on record the documentary evidence in the form of Panchnama (Exh.7), Complaint (Exh.8), C.A.Report dated 25th January 1988 (Exh.19) and an extract of Virar Police Station station diary at Exh.26 dated 29th April 1989. I have perused the panchnama and other relevant documents. The Panchnama of Exh.7 describes the quantity of contraband found and its approximate price. The Report of Chemical Analyser discloses that Charas was detected in sample.

16. In view of aforesaid factual position, it will be necessary to refer to submissions made by the Advocate for the Appellant. His first submission is that the procedure for search was started before the sunrise and in fact it had

started before 5.00 a.m. He submitted that P.S.I. Shri Kadam has not stated that he reduced in writing the information received by him and he was under obligation to forthwith send a copy of the information to his immediate superior officer. He submitted that as the search was taken before sun-rise, the Police Officer ought to have complied with the proviso to sub section 1 of section 42 of the said Act of 1985. As per the said proviso if the Officer who conducted the raid had received the information has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief. Admittedly grounds for such belief are not recorded. He submitted that no compliance with sub section 2 of section 42 has been made.

17. P.S.I. Shri Kadam has reduced the information received by him in the station diary at Virar Police Station at 4.35 a.m. The extract of original entry in Marathi language is at Exhibit 26. The English translation thereof annexed to the paperbook is defective. The said information discloses that some unknown persons have unloaded the packets/bags of charas from a motor truck and the same have been hidden under the ground. The entry records that the Appellant was keeping a vigil over the packets. It is stated that the bags have been

unloaded on the eastern side of Bombay Ahmedabad Road opposite the hotel cum house of the Appellant. Perusal of the deposition of P.S.I. Kadam shows that according to the said witness, information received was that on the eastern side of the Bombay Ahmedabad Highway near the house of Suresh Tare at village Sakwar one person had brought charas in a truck and it was unloaded at that place. Exh.26 (extract of station diary) specifically records that the information was that the bags of charas were unloaded near the house of the Appellant. Thus, the information received was not that the charas has been unloaded either in the house or in the hotel of the Appellant. P.S.I. Kadam has further stated that when they went to the hotel of the Appellant, he was found sitting at the cash counter. It is further stated that 11 boxes of charas were found hidden in the passage. Other bags were found in the open space on the southern side of the house and on the northern side of the house. He has not stated that passage referred to is either enclosed or covered. In any case it is obvious from his evidence that the recovery of 11 bags of charas in the passage was purely a chance recovery in the sense that there was no specific information received that the bags of charas were stored in the passage. From his cross examination, it appears that a suggestion was given to him that none of the gunny bags was found in the passage at the time of search. In the cross examination P.S.I. Kadam denied the suggestion given to the effect that anyone has access to the passage. In the cross examination he reiterated that he

received information that some unknown persons have hidden gunny bags of charas underneath the ground in front of hotel premises of the Appellant. It will also necessary to refer to panchanama at Exh.7. The panchnama records that the police took search in between the residential house and the hotel and in the open space the bags were found. Panchnama further records that the contraband was found in the open space between the residential house of the Appellant and the hotel.

18. Thus, even assuming that the passage between the house and the hotel is an enclosed passage, the recovery made therein is purely a chance recovery. No suggestion has been given to any of the witnesses to the effect that the recovery was made from the house of the Appellant. Even if it is to be assumed that the recovery was made from the hotel, it will be a public place within the meaning of section 43 of the N.D.P.S.Act as per the definition contained in the explanation to section 43.

19. It is a well settled position of law that if search is taken in accordance with section 43, in that case it is not necessary to follow the requirements of section 42. It is also well settled position that in respect of a chance recovery, the search will not be governed by section 42 of N.D.P.S. Act. It is, thus, obvious that in the present case, it was not at all necessary to comply with the provisions of section 42 of N.D.P.S.Act. The learned Advocate for the

Appellant has placed reliance on the decision of the Apex Court in the case of State of Punjab vs. Balbir Singh (A.I.R. 1994 S.C. page 1872). His contention was that as mandatory provisions of section 42 were not complied with, the conviction is vitiated. However, I find that section 42 was not at all attracted in the facts of the present case.

20. P.W.No.1 P.S.I. Kadam has stated that the seal of the police station was affixed on the attached sample as well as on the attached gunny bags. In his evidence he has not deposed that the seal was handed over in the custody of the Officer in-charge of the Virar Police Station. In fact, there is no evidence to that effect on record. Moreover, there is no evidence on record to show that a copy of the said seal was forwarded to the Chemical Analyser. Reliance was placed by the learned Advocate for the Appellant on the decision of the Division Bench of this Court in case of Wessel Van Beelan Vs. State of Goa (1999 (5) Bombay Cases Reporter page 575). He placed reliance on paragraph 18 of the said decision which reads thus :

"18. The availability and accessibility of the specimen seal, with which the contraband is sealed, with the I.O. after the sealing of the contraband may throw doubt of tampering with the sealed contraband and this doubt may be reinforced in a given case when the description of the contraband sealed does not tally with the

description of the contraband received by the Chemical Analyser. This doubt may be further reinforced in cases where the accused refuses to sign the sealed envelope containing contraband. In cases where the accused signs the sealed envelope containing contraband, it may not be possible to tamper with the said envelope or its seals, but where the accused refuses to sign sealed envelope containing contraband, there may be possibility of tampering with the contents of the sealed envelope with the help of the panchas. The normal procedure which the police should adopt, so as to remove any doubt regarding availability and accessibility of the specimen seal, after the envelope containing contraband is sealed with such specimen seal, should be that at the time when the envelope containing contraband is sealed, the raiding officer should simultaneously take the specimen impression of the said seal on a letter which could be simultaneously prepared for sending the same to Chemical Analyser. Once the impression of the specimen seal is so obtained, the specimen seal should be deposited immediately on return to Police Station, so as to ensure that the said specimen seal is not available to the raiding officer. A full proof method in this regard could be devised by the police, which would ensure that the specimen seal would not be available to the raiding officer afterwards.

His submission is that what has been observed by the Division

Bench of this Court has not been followed at all. He also invited my attention to section 55 of the N.D.P.S.Act.

21. Every non compliance with statutory provisions of N.D.P.S. Act will not either vitiate the trial or affect the conviction. Every procedural requirement under the N.D.P.S. Act is not necessarily mandatory. It is difficult to come to the conclusion that the requirement of sending a copy of seal to the Chemical Analyser along with the sample or requirement of depositing the seal with the Officer in-charge of the concerned Police Station are mandatory requirements which can be read into section 55 of the said Act. What has been incorporated in paragraph 18 of the decision of the Division Bench of this Court in case Wessel Van Beelan (supra) is the procedure which should be normally followed. The decision of the Division Bench cannot be read as laying down a ratio that the procedure laid down in paragraph 18 is mandatory.

22. The learned Counsel for the Appellant had also relied upon the decision of the Apex Court in case of State of Rajasthan Vs. Gurmail Singh (2005 Cr.L.J. page 1746). He placed reliance on the observations made in paragraph 3 of the said decision. Perusal of the said decision of the Apex Court shows that the same is rendered in peculiar facts of the case before the Apex Court. The Apex Court observed the link evidence adduced by the prosecution was not at all satisfactory and there was no evidence to prove satisfactorily

that the seals found were in fact the same seals as were put on the sample bottles immediately after seizure of the contraband. Even this decision of the Apex Court cannot be read as laying down a proposition of the law that the failure to send a sample of the seal along with the sample of contraband to the laboratory will affect the conviction or that it will cause prejudice to the accused. Whether the sample which is collected at the time of search or seizure was the same sample sent to the Chemical Analyser or not is a factual question which is required to be decided in every case depending upon the evidence on record. It is not axiomatic that the failure to forward the sample of the seal or failure to deposit the original seal with the police station will render the conviction illegal.

23. Therefore, the contention raised by the learned Advocate for the Appellant will have to be decided on the basis of the evidence on record. So far as the evidence of sealing of the gunny bags and sample plastic bags is concerned, I have already referred to the evidence of P.W.No.1 Kadam. P.W.No.2 Harun Suleman Sayyed has reiterated what has been stated by P.W.No.1 Kadam. P.W.No.3 Hiraman Panchal has also deposed about the sealing of samples and gunny bags. The evidence of P.W.No.4 Mataprasad is very relevant on this aspect. In examination-in-chief he was shown the sealed packets received from the Chemical Analyser. He stated that the sealed packets were the same wherein the sample was collected. In the cross

examination there is no serious challenge to this part of the examination-in-chief.

24. As there is no serious challenge in the cross examination of the P.W.No.4, it is very difficult to accept the said contention of the learned Advocate for the Appellant. In the facts of this case, the conviction is not vitiated because the sample of the seal was not forwarded along with the sample of the contraband to the Chemical Analyser. It is established by the prosecution that the sample collected at the time of search was sent to the Chemical Analyser and the report at Exh.19 is as regards the same sample.

25. The learned Counsel for the Appellant has placed reliance on the decision of the learned Single Judge of this Court in case of Raju Girdharilal Shrivastav Vs. State of Maharashtra [2004 All M.R. (Cri.) page 3053] and in particular what is observed in paragraph 30 of the said decision. The learned Single Judge held that merely because by virtue of section 293 of the Code, the report of the public analyst could be admitted in evidence and exhibited without giving evidence before the court by itself does not mean that the same is to be accepted straightway as a conclusive proof of evidence against the accused especially when the report does not contain even a grain of material indicating on what scientific tests the opinion was arrived at. The learned Judge held that the court cannot surrender to any bare opinion of the public

analyst as it may amount to abdication of its judicial function relegating itself to mechanically record the order of conviction and sentence without doing anything else. It will be necessary to advert to the facts of the case before the learned Single Judge. The learned Single Judge was dealing with the Appeal against conviction of the Appellant under section 21 of the N.D.P.S.Act where the allegation was that the Appellant was in possession of 12.5 gm of gard. The Prosecution had relied upon the certificate at Exh.22 of Public Analyst. The report of the Public Analyst in the said case has been reproduced in the said decision of the learned Single Judge. The report showed that all that was stated in the report was that Heroine (Diacety Imorphine) was detected in the exhibit along with other opium alkaloids. In the context of the said report before this court, the observation in paragraph 30 has been made. In the present case, the report at exh.19 issued by the Assistant Chemical Analyser to the Government records the appearance, the quantity and the smell of the sample. It also records the description of the tests performed. It refers to the fact that the result of the tests (i) Negm’s test for hemp and (ii) T.L.C. for cannabis were positive. The result of the tests is recorded as positive. Thus, this is not a report which records the bare opinion of the Chemical Analyser that Charas was found in the sample. The requisite details of the tests carried out by the Chemical Analyser are also mentioned in the report. Nothing is shown or suggested that the tests which are mentioned in

the said report are neither scientific nor accurate. Thus, the report in the present case does not contain the bare opinion and therefore the decision relied upon by the learned Counsel for the Appellant in case of Raju Girdharilal Shrivastav (supra) will not help the Appellant. Therefore, the said contention deserves to be rejected.

26. The learned Advocate for the Appellant has invited my attention to the evidence led by the prosecution which shows that the total weight of the sample was 800 gms and the report of the Chemical Analyser at Exh.19 discloses that the weight of 745 gms. In my view, this cannot be said to be a major contradiction or infirmity in the prosecution case. The difference in the weight is not so much to make the case of the prosecution doubtful. He made submission as regards appearance of the sample as disclosed in the report of the Chemical Analyser and submitted that there is discrepancy in the prosecution case as regards the colour of the sample. In my view, this discrepancy pointed out in the prosecution will not affect the core of the prosecution case when the prosecution has otherwise established the fact that the sample analysed by the Chemical Analyser was the one collected at the time of raid.

27. A submission was also made that the person who carried the samples to the office of the Chemical Analyser has not been examined. In the evidence of the P.W.No.5-Shankar he

stated that the attached muddemal was sent with a forwarding letter signed by the P.I. Nimbalkar to the office of the Chemical Analyser and same was received in the office of the Chemical Analyser on 6th January 1988. The said letter was proved and exhibited in the evidence. Perusal of the cross examination of the said witness shows that there is no challenge at all to the said part of the deposition of the P.W.No.5. The cross examination was as regards failure to enclose proforma along with letter at Exh.18. Therefore, there is no merit in the said submission as well.

28. Thus, if overall view of the evidence on record is taken, this is a case where the prosecution has proved the offence involving Charas totally weighing 1188 kgs. the value of which was approximately Rs.1,19,01,500/-. I find no infirmity in the impugned Judgment and Order.

29. Hence, I pass the following order:

i) Appeal is dismissed.

ii) Appellant is directed to surrender to bail. The Appellant shall be taken in custody to undergo the sentence.

. At this stage, the learned Advocate for the Appellant prays that some time may be granted to the Appellant to surrender as his present age is about 60 years and he is suffering from various ailments. Accordingly, time of two weeks is granted

to the Appellant to surrender.

JUDGE